Filed 10/2/01

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RODNEY G. KING, Plaintiff and Appellant, v. STEVEN A. LERMAN et al., Defendant and Respondent.	B139783 (Los Angeles County Super. Ct. No. BC155348)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ann Kough, Judge. Affirmed.

Law Offices of Renee L. Campbell, Renee L. Campbell; Law Offices of Alvin L. Pittman and Alvin L. Pittman for Plaintiff and Appellant.

Keith A. Fink & Associates, Keith A. Fink and Rhea G. Mariano for Defendants and Respondents.

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Rodney King appeals from a summary judgment entered in favor of Steven A. Lerman and Steven A. Lerman & Associates (collectively Lerman), in King's action against Lerman for attorney malpractice. Lerman's motion for summary judgment was sustained on the ground that the action was barred by the statute of limitations. King contends: "I. The statute of limitations was tolled as a result of respondent's continuous representation of appellant. . . . [¶] . . . II. Appellant's claims are not time barred by the statute of limitations because appellant could not reasonably have discovered the wrongful conduct more than one year before the malpractice complaint was filed. . . . [¶] . . . III. The statute was tolled because appellant had not sustained actual injury until the *Grimes v. King* arbitration was decided. . . . [¶] . . . IV. The trial court wrongfully sustained respondent's evidentiary objections. . . . [¶] . . . V. The trial court properly found that there were triable issues as to respondent's malpractice."

While we are sympathetic to King's position as a client whose attorneys may have overstepped in collecting their fees, we conclude, as did the trial court, that this action is barred by the statute of limitations.

PROCEDURAL AND FACTUAL BACKGROUND

In a notorious incident in March 1991, Los Angeles Police Department officers beat King after a high-speed chase while a bystander recorded the event on videotape. King, represented by Lerman, filed an action in May 1991, in federal district court seeking damages for the injuries he suffered in the beating. (*King v. City of Los Angeles, Los Angeles Unified School District* (U.S.D.C. Case No. CV 91-2497 JGD (Tx)) (the underlying action).) Under the terms of Lerman's and King's written retainer agreement, Lerman was to receive 25 percent of the judgment. Lerman also made advances to King for living expenses and for costs of litigation. The agreement made no reference to the award of attorney fees pursuant to 42 United States Code, section 1988 (section 1988).

The trial court stayed discovery in the underlying action pending judgment in the related criminal proceeding. At some point "early in the litigation," the Los Angeles

Unified School District (LAUSD) offered King $50,000 in settlement. Lerman states in declaration testimony that "we" rejected the offer, and King denies having been notified of the offer. In April 1992, the discovery stay was lifted. Lerman propounded no discovery to LAUSD.

In October 1992, King terminated Lerman's representation and substituted as counsel Milton Grimes and the Law Office of Milton C. Grimes (collectively Grimes). The written retainer agreement between Grimes and King also provided for attorney fees of 25 percent of the judgment and for Grimes to advance living expenses and costs of litigation. It provided that Grimes could hire at his own expense persons to assist Grimes in his representation of King. It made no reference to section 1988 fees. Grimes associated other attorneys to assist with the underlying action, including Federico C. Sayre and the Law Offices of Federico Castelan Sayre (collectively Sayre), and John Burris and the Law Offices of John Burris (collectively Burris).

During the time that Grimes represented King, LAUSD offered to waive fees, expenses and costs in return for dismissal. On February 4, 1994, LAUSD refused an offer by Grimes to dismiss the case against it in return for a waiver of fees and costs. LAUSD was not dismissed from the underlying action. In March 1994, LAUSD successfully moved for summary judgment. In April 1994, King prevailed against the City of Los Angeles (the City) and obtained a verdict in the amount of approximately $3.8 million.

A number of King's attorneys, including Grimes, Sayre, Burris, and Lerman, applied to the district court on behalf of King for attorney fees pursuant to section 1988. The district court awarded approximately $1.6 million in section 1988 fees. The section 1988 fee award was less than the amount the attorneys had sought, and provided compensation only for services regarding matters upon which King had prevailed.

On August 2, 1994, King terminated his relationship with Grimes and rehired Lerman to represent him with regard to his financial obligations in connection with the underlying action. King said in deposition that he left Grimes because Grimes stopped

advancing living expenses after King refused to sign an agreement assigning to Grimes any section 1988 fees awarded. King had been advised by Darrell Pearson that the section 1988 fees belonged to him. King also retained Pearson to review his retainer agreement with Lerman and other matters involving the underlying action. In addition, King consulted the Busch firm, which is not otherwise described in the record. The district court granted LAUSD's motion for attorney fees in the amount of $237,958 on August 11, 1994. Lerman later complained that he had not been informed of the hearing.

In October 1994, King received a check in the amount of $3,633,952.87 from the City in payment of damages in the underlying action. Lerman disbursed the money to himself, King, and Grimes. In April 1995, King received a group of checks made payable jointly to himself and the attorneys whose services were reflected in the section 1988 fee award.

Sayre and Burris contacted King and Lerman, requesting that the section 1988 fees attributable to their work on the underlying case be distributed to them. Lerman took the position that the section 1988 fees belonged to King, and that the attorneys should seek payment from Grimes. Lerman recommended depositing funds into a neutral bank account for the benefit of the successful parties to a binding global arbitration.

Sayre initiated litigation against King to recover the value of his services in the underlying case. Burris threatened to do the same. Lerman learned that Grimes claimed that he had an oral agreement with King that the attorneys were to receive any section 1988 fees awarded. Lerman advised King to disburse the respective shares of the section 1988 fees to Sayre and Burris in settlement of their claims. Lerman also advised King to disburse $70,940.56 to Lerman. Lerman recommended that King consult other counsel before disbursing the section 1988 fees. King obtained the advice of an Oakland attorney, Sam Norman, before agreeing to the disbursements.

On or about June 1, 1995, King endorsed checks for the section 1988 fees to Sayre, Burris, and Lerman. When King wasn't reimbursed for the amounts of the section 1988 fees within one or two weeks, King "knew there was something wrong" and that his

attorneys were "doing [him] wrong." By June 15, 1995, King had retained Stanley Steinberg to advise him in his action against Grimes. By mid-June 1995, Lerman was "long gone." King told Sayre in mid-June 1995 that King was no longer represented by Lerman. As of August 1996, Lerman still held funds in his King trust account.[1] King, represented by Steinberg, filed his action against Lerman for legal malpractice on August 9, 1996.

In February 1997, Retired Court of Appeal Justice John K. Trotter, in binding arbitration, awarded Grimes 25 percent of the amount of King's judgment in the underlying action, including the section 1988 fees. The award provided for no offset for the amounts which had been paid from the section 1988 fee award. In September 1998, King amended the complaint in the present action to add as defendants Sayre and Burris.[2]

King's fourth amended complaint (FAC), the operative pleading, alleges counts for malpractice (count 1), breach of contract (count 2), intentional and negligent breach of fiduciary duty (counts 3, 4), civil conspiracy (count 5), fraud and deceit (count 6), money had and received (count 7), accounting (count 8), and conversion (count 9). The first four counts are alleged only against Lerman. The fifth, seventh, eighth, and ninth counts are alleged against all defendants. The sixth count is alleged against Sayre and Burris. The FAC seeks damages, constructive trust, and an accounting. It alleges that Lerman breached his duty of ordinary and reasonable care by naming and maintaining

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[1] Lerman's declaration in support of his summary judgment motion states that he did not represent King after June 1995. Lerman's supplemental declaration repeats that he did not represent King after June 1995. It states that after June 1995, Lerman cooperated with Steinberg by providing information and documents, and that Lerman's only professional contact with King consisted of occasional free advice regarding record and movie deals. King has pointed to no evidence tending to show that Lerman was more than a stakeholder with respect to the remaining funds in the trust account.

[2] These additional defendants are not parties to this appeal.

LAUSD as a defendant in the underlying action and by disbursing monies to Sayre, Burris, and Lerman.

Lerman, Sayre, and Burris moved for summary judgment. The trial court granted the motion based upon its conclusion that the statute of limitations barred King's claims. The trial court also granted certain of Lerman's evidentiary objections to King's evidence in opposition to Lerman's motion for summary judgment. This appeal followed.

DISCUSSION

On appeal from a summary judgment, we review the record de novo, considering all evidence except that to which objections have been made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We determine whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial. (*Ibid.*)

I. *Continuous Representation*

King contends that Lerman failed to establish as a matter of law that his representation of King ended more than one year before King filed suit. We disagree.

Section 340.6 of the Code of Civil Procedure establishes a one-year limitations period for legal malpractice. The section also provides that the statutory period shall be tolled during the time that the "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred . . . ." (*Id.* at subd. (a)(2).) "The test for whether the attorney has continued to represent a client on the same specific subject matter is objective, and ordinarily the representation is on the same specific subject matter until the agreed tasks have been completed or events inherent in the representation have occurred." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528.) Continuity of representation depends upon evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.

(See *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1498.) Here, the evidence leads to the conclusion that the limitations period was not tolled.

Prior to signing the section 1988 fee checks to Sayre, Burris, and Lerman, King received the advice of several other attorneys with respect to the section 1988 fees. Lerman distributed the section 1988 fees during the first half of June 1995, completing that task. King testified that the period when Sayre proposed to dismiss his suit against King in exchange for his section 1988 fees, which was prior to June 15, 1995, was "[t]owards the end of our relationship, me and Mr. Lerman . . . ." King testified that by mid-June 1995, Lerman was "long gone." King told Sayre on June 16 or 17, 1995, that King was no longer represented by Lerman. Approximately one week later, King informed Sayre that he had retained Attorney Stanley Steinberg to represent King in a lawsuit against Grimes. King told Lerman in mid-June 1995, that he no longer trusted Lerman and that he had hired a new attorney to represent him and to "get my monies back." Lerman later learned that the new attorney was Steinberg. Lerman did not represent King in connection with King's claim against LAUSD after Grimes substituted in for Lerman in October 1992.

In his appellant's opening brief, King takes the position that he misspoke when he stated that by mid-June 1995, "Lerman was long gone," and that he intended to say that another attorney, Norman, was long gone. The transcript testimony, however, is supported by King's other statements that he had terminated Lerman's representation by June 15, 1995. King did not request correction of the deposition transcript, and did not raise this issue in the trial court. Even without this statement, the record would support the conclusion that Lerman did not continue to represent King in the specific subject matter after June 1995.

"[T]he limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff." (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 229.) Lerman stated in declaration testimony that after June 1995, he cooperated with Steinberg by providing him with

information and documents, but did not represent King.[3] Lerman also stated that his only professional contact with King after June 1995 consisted of advice at no charge with respect to King's record label and a possible movie deal.

We conclude that the record shows that Lerman's representation of King on matters concerning King's financial obligations growing out of the underlying action and the continuation of LAUSD as a party was terminated by the end of June 1995. King did not raise a triable issue of material fact with regard to whether Lerman continued to represent him regarding the specific subject matter after that time.

II. *Discovery of the Wrongful Conduct*

Discovery in a malpractice action occurs when the client becomes aware of the facts upon which his claim is based. (See 3 Witkin, Cal. Procedure (4th ed. 1996) § 578, p. 734.) Discovery has occurred when the plaintiff believes he has been wronged and loses confidence in his former attorney. (See *Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 1223-1224 [discovery occurred when the plaintiff realized he had been betrayed, swindled, and lied to by counsel].) The evidence submitted upon summary judgment shows that King discovered Lerman's wrongful conduct regarding disbursement of the section 1988 fees in June 1995. King endorsed the City's checks to Lerman, Sayre, Burris, and their associates on June 1, 1995. In deposition testimony, King stated that no more than one or two weeks after he endorsed the checks, he questioned Lerman's advice and knew "there was something wrong," and that his attorneys were "doing [him] wrong." He consulted other attorneys, who advised him that

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3 The trial court disallowed an unauthenticated transcript of an arbitration proceeding submitted by King. In the transcript, Lerman states that he continued to represent King on peripheral matters until King filed suit against him. We discuss the evidentiary ruling below.

the section 1988 fees belonged to him. King was aware of the facts giving rise to his malpractice action against Lerman in June 1995.

King also asserts that Lerman's failure to promptly turn over records and provide an accounting to Steinberg is a separate factor raising a triable issue of fact regarding the date of discovery. Failure to receive the case file in itself does not toll the statute of limitations for attorney malpractice. (See *Kabbe v. Miller* (1990) 226 Cal.App.3d 93, 97.)

In December 1995, Steinberg requested "copies of all records regarding funds that were received by your office and the disbursement of those funds . . . ." In July 1996, Steinberg informed Lerman that due to Lerman's cooperation, Steinberg had made a "partial accounting" of the money disbursed by Lerman. Steinberg then requested copies of checks, which he had received by August 5, 1996. King, like the plaintiff in *Kabbe v. Miller*, *supra*, is unable to identify either how any absent records relate to the injury he allegedly suffered or how the failure to possess the records prevented him from filing a lawsuit.

King does not point to any specific document the absence of which prevented his discovery of Lerman's wrongful conduct. Nor does he show that Lerman in any way misled King and his counsel. King's showing is insufficient to raise a triable issue of fact regarding discovery of the asserted malpractice.

In his appellant's opening brief, King does not discuss the factual or legal issues involving discovery of Lerman's malpractice in connection with LAUSD as a party to the underlying action. Consequently, appellant has waived any argument with respect to the trial court's ruling on this point. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; and see *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1.)

III. *Actual Injury*

Section 340.6 of the Code of Civil Procedure also provides for tolling during the time that the "plaintiff has not sustained actual injury . . . ." (*Id*. at subd. (a)(1).) "Actual

injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 743.) In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra,* plaintiffs alleged that defendants committed malpractice by failing to advise them to assert a timely claim for liability insurance benefits covering the underlying action. The court held that actual injury occurred when the plaintiffs lost business profits and incurred the expense of defending the underlying action before settlement of insurance coverage litigation. (*Id.* at p. 752.)

King contends that he did not suffer actual injury with respect to the distribution of section 1988 fees until the *Grimes v. King* arbitration was decided in February 1997, six months after King filed suit against Lerman. The arbitration ruling required King to pay Grimes 25 percent of the total judgment in the underlying action without an offset for the amounts the other attorneys had received from the section 1988 fees. According to King, until that occurred, he believed he would recoup from Grimes the amounts he had paid to the other attorneys.

We conclude that actual injury occurred in June 1995 when the section 1988 fees were distributed. King knew that the section 1988 fees were paid at the time to settle the claims of Sayre and Burris. He also knew that he was disbursing a portion of the fees to Lerman. King had been advised that the section 1988 fees belonged to him. He felt that there was something wrong when the fees had not been reimbursed within one or two weeks.

The detrimental effect of the neglect was not contingent on the outcome of the arbitration proceeding. King suffered the injury when he paid the monies to the attorneys. The arbitration proceeding was simply an alternative means to mitigate the injury. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra,* 18 Cal.4th at p. 744 [injury occurred when client required to use its own funds to defend suit, not at conclusion of subsequent coverage litigation against insurer].)

IV. *Evidentiary Objections*

King contends the trial court erred in excluding King's declaration testimony regarding when and why Lerman was replaced as counsel. Under *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22, admissions contradicted by self-serving statements in a party's declaration remain valid admissions. A supplementation of testimony which does not contradict, but rather explains the deposition statements, goes to the weight of the evidence, not its admissibility. (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1503-1504.)

In deposition testimony, King stated that by the middle of June, "Mr. Lerman was long gone . . . ." King was worried, expected to get his money back right away, and "didn't think [Lerman] would do me like he did me, but [King] knew [he] had to do some homework." In his separate statement of disputed material facts, King averred that Lerman was "substituted by Stanley Steinberg."

In declaration testimony, however, King said that "I trusted Lerman, Sayre and Burris as my current lawyer and the lawyers who had recently represented me in association with Grimes and even after the monies were paid to them, I continued to trust and rely upon what my lawyers said." King's declaration testimony does not merely explain or expand upon his deposition statements, but directly contradicts them.

King also contends the trial court erred in excluding certain other portions of his declaration. Lerman objected to King's declaration testimony (1) that Lerman did not turn over his files to Steinberg for several months and (2) that Lerman continued to advise him regarding the fee dispute with Grimes and on payments to Sayre and Burris until August 1996. Lerman's objection to the former was properly sustained because the statement lacks foundation, is speculative, and is apparently based upon hearsay. (Evid. Code, §§ 403, 405, 1200.) The latter was properly sustained because the statement contradicts King's deposition testimony. King has not shown that the rulings were in error.

King also contends that the trial court erred in excluding a purported transcript of the arbitration proceeding in *Grimes v. King*. The document states that Lerman was asked when King terminated Lerman's representation and that Lerman replied, "I guess technically he left me the day that he filed the lawsuit against me because I had been kind of involved in other peripheral matters." Lerman successfully objected to the admission of the transcript on grounds that the declaration of King's attorney, Renee Campbell, that the pages of the transcript included in King's opposition were true and correct copies of pertinent pages from the arbitration testimony lacked foundation, was speculative and was conclusory. The trial court declined to take judicial notice, stating, "While verbatim transcripts of arbitration proceedings and awards may be admissible, they are not subject to judicial notice; further the purported transcript and order are not certified [nor is the transcript complete]."

A decision not to take judicial notice will be upheld on appeal unless the reviewing court determines that the information furnished to the judge was so persuasive that no reasonable judge would have refused to take judicial notice. (See *Willis v. State of California* (1994) 22 Cal.App.4th 287, 291; Evid. Code, § 452.) In *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324, the court suggests that the record of an arbitration conducted as part of a judicial action may be something of which the court would be permitted to take judicial notice under section 452, subdivision (d) of the Evidence Code.

Here, however, the trial court noted that the purported transcript of the arbitration proceeding was uncertified and incomplete. Moreover, Campbell, who attempted to authenticate the transcript, did not state that she was in attendance at the hearing or could otherwise vouch for the document's authenticity. (Evid. Code, §§ 403, 405.) King has not shown that the trial court abused its discretion in precluding the document.

King contends the trial court erred in excluding certain portions of the declaration of his expert, David Parker. Since we do not reach the issue of the showing of malpractice by Lerman, we need not address this point.

V. *Lerman's Malpractice*

In light of our conclusions on the preceding issues, we need not address King's contention that the trial court properly found that there were triable issues regarding Lerman's malpractice.

DISPOSITION

The judgment appealed from is affirmed. Costs to Lerman.

NOT FOR PUBLICATION.

_____, Acting P.J.

NOTT

We concur:

_____, J.

COOPER

_____, J.

TODD